102

Supreme Court, U.S.
FILED

(1)

08-234 JUL 23 2008

OFFICE OF THE CLERK
William K. Suter, Clerk

No. 08-

IN THE

Supreme Court of the United States

JOHN P. FOLEY,

Petitioner,

v.

SMA LIFE ASSURANCE COMPANY; STATE MUTUAL OF AMERICA aka ALLMERICA FINANCIAL LIFE INSURANCE AND ANNUITY COMPANY and JOHN HANCOCK LIFE INSURANCE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOHN P. FOLEY
Attorney for Petitioner
601 So. Rancho, Suite A1
Las Vegas, Nevada 89106
(702) 363-2323
(702) 386-5900

217437

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

This case involves a class action instituted by Plaintiffs Victor Bussie, Morley Morgana, Quentin Dawson, and Margaret Dawson, individually, and as representatives of all other similarly situated (Citizens of States other than Massachusetts) against Allmerica Financial Corporation, SMA Financial Corporation, First Allmerica Financial Life Insurance Company, and Allmerica Financial Life Insurance and Annuity Company, Defendants, (of Massachusetts) based on diversity of citizenship for claims of fraud for sums in excess of $75,000.00 and for violation of the Federal Truth in Lending Statute.

Can said class action confer jurisdiction over JOHN P. FOLEY, a Nevada citizen, who purchased life insurance from SMA in 1985 when he was 58 years old that was increased to $240,000 in 1986 for a premium of $1022.93 per quarter that was interest rate sensitive. The premium would decrease with interest rates above 4 1/2% per annum, and increase with rates under 4 1/2% per annum?

The class action of *Bussie v. Allmerica*, 50 F. Supp. 2d 59 (1999) was dismissed with prejudice in 1999. In 2003 SMA breached its contract with Petitioner by unilaterally raising the premium when interest rates were over 4 1/2% per annum. This Court must decide whether Petitioner had to opt out of the class action in 1998 or 1999 when he had no claim for fraud or violation of the Truth in Lending statute. Petitioner's only claim was in 2003 for breach of contract for over charges.

Petitioner's claim only totaled $10,322.58 in 2005 when he filed his State Court action in Nevada.

The United Stated District Court in Massachusetts and the First Circuit Court of Appeals both held that Petitioner cannot proceed with his Nevada action and issued an injunction because Petitioner did not opt out of the class action during the years 1998 and 1999.

The question is can Federal jurisdiction under Article III of the United States Constitution and Federal Rules of Civil Procedure, Rule 23 be extended to Petitioner under these circumstances in 2006?

LIST OF PARTIES

The parties listed in the caption in the United States District Court of Massachusetts are Victor Bussie, Morley Morgana, Quentin Dawson and Margaret Dawson, individually and as representative of all other similarly situated, Plaintiffs, v. Allmerica Financial Corporation, SMA Financial Corporation; First Allmerica Financial Life Insurance Company; Allmerica Financial Life Insurance and Annuity Company, Defendants. Petitioner John P. Foley is not a named party in the class action, nor is he a third party plaintiff, third-party defendant or intervener in the *Bussie* case. The *Bussie* case was dismissed in 1999 with prejudice. Petitioner was brought before the United States District Court of Massachusetts in 2006 when Allmerica filed a Motion in the *Bussie* case for an injunction against Petitioner from pursuing the Nevada action.

The caption of the case in the First Circuit Court of Appeals reads as follows: Victor Bussie, Raoul A. Galan, Jr., Quentin Dawson, Margaret Dawson, Plaintiffs, John P. Foley, Appellant v. Allmerica Financial Corporation, SMA Financial Corporation, First Allmerica Financial Life Insurance Company; Allmerica Financial Life Insurance and Annuity Company, Defendants, Appellees.

The parties in the *Bussie* case, other than those named in the caption, have no interest in this proceeding.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
List of Parties	iii
Table of Contents	iv
Table of Appendices	v
Table of Cited Authorities	vi
Opinions Below	1
Jurisdictional Statement	1
Statement of the Case	2
Conclusion	8

TABLE OF APPENDICES

Page

Appendix A — Judgment Of The United States Court Of Appeals For The First Circuit Entered April 24, 2008 ..... 1a

Appendix B — Memorandum And Order Of The United States District Court For The District Of Massachusetts Filed May 18, 2007 ..... 3a

Appendix C — Memorandum And Order Of The United States District Court For The District Of Massachusetts Filed September 19, 2006 ..... 7a

Appendix D — Order Of The United States District Court For The District Of Nevada Filed January 25, 2006 ..... 18a

TABLE OF CITED AUTHORITIES

Page

Cases:

Alitalia-Linee Aeree Italiane v. Second Judicial District Court of the State of Nevada, 92 Nev. 638, 556 P.2d 554 (1976) 4

Bussie v. Allmerica, 50 F. Supp. 2d 59 (D. Mass 1999) ..... i, iii, 1, 3, 4

Cotter v. City of Boston, 323 F.3d 160 (1st Cir. 2003) 6, 7

DaimlerChrysler v. Cuno, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006) 6

Exxon Mobile Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 125 S. Ct. 2611 (2005) 6, 7, 8

Snyder v. Harris, 394 U.S. 332, 89 S. Ct. 1053 (1969) 7

United States Constitution:

Article III ..... ii, 5, 6, 7, 8

Cited Authorities

Page

Statutes and Rules:

Title 28 U.S.C. § 1254(1) 2

Title 28 U.S.C. § 1367 8

Title 28 U.S.C. § 2101(c) 2

Fed. R. Civ. P. 23 ..... ii, 6, 8

JOHN P. FOLEY, Esq. as attorney for John P. Foley, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The unpublished Judgment of the United States Court of Appeals for the First Circuit was issued on April 24th, 2008. (App. 1a - 2a). The unpublished Memorandum & Order of the United States District Court District of Massachusetts was filed on May 28th, 2007. (App. 3a - 6a). The unpublished Memorandum & Order of the United States District Court District of Nevada was filed on September 19th, 2006. (App. 7a - 17a). The unpublished Order of the United States District Court, District of Nevada filed January 25th, 2006. (App. 18a - 25a).

JURISDICTIONAL STATEMENT

The United States District Court for the District of Massachusetts had jurisdiction over the class action, *Bussie v. Allmerica Financial Corporation*, 50 F. Supp. 2d 59 (D. Mass 1999).

Said United States District Court for the District of Massachusetts assumed jurisdiction over Petitioner and issued an injunction against Petitioner proceeding with a State Court action in Nevada against Allmerica Financial Corporation and John Hancock Insurance Company. Said Massachusetts District Court issued two Opinions, one on September 29th, 2006, and on May 28th, 2007.

On appeal to the United States District Court of Appeals for the First Circuit, the Court of Appeals entered Judgment against Petitioner on appeal on April 24th, 2008.

This Court has jurisdiction to review the final judgment of the First Circuit Court of Appeals under Title 28 U.S.C. § 1254(1) and Title 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

1. Petitioner, JOHN P. FOLEY, and his wife PHYLLIS D. FOLEY purchased insurance policies from SMA in 1985. John's policy was for $100,000, and Phyllis' was for $50,000.00. The next year in 1986 John increased his coverage to $240,000. John's premiums were $1,022.93 per quarter, and Phyllis' premiums were $271.00 per quarter.

2. John and Phyllis duly and regularly paid their respective premiums, Phyllis until the end of her life on August 1, 2006.

3. John paid his premium of $1,022.93 per quarter, until February 2003, when SMA unilaterally raised his premium by $84.30 (the first overcharge). Then John paid the following overcharges under protest:

April 2003	$ 610.69
June 2003	$ 674.08
October 2003	$2,634.46
February 2004	$ 626.65
June 2004	$ 674.08
August 2004	$ 854.23

September 2004	$ 63.00
November 2004	$ 947.48
January 2005	$ 954.92
March 2005	$1,099.59
May 2005	$ 941.23
July 2005	$1,043.28
August 2005	$ 12.33
September 2005	$ 163.20
November 2005	$1,143.38
January 2006	$1,144.10
March 2006	$1,144.10
May 2006	$1,128.77
July 2006	$1,242.23
August 2006	$ 112.01
October 2006	$ 272.93
November 2006	$1,354.19
January 2007	$1,354.19
March 10, 2008	$2,127.00
March 27th, 2008	$3,317.07

John paid the overcharges under protest.

4. When overcharges amounted to $10,327.58, John filed suit in his home state court for $10,327.58. SMA removed the case to the Federal Court in Nevada. SMA also filed a Motion to Transfer the Case to the U.S. District Court of Massachusetts, to the case of *Bussie v. Allamerica*, 50 F. Supp. 2d 59 (D. Mass 1999) a class action that commenced in 1997 and ended in 1999, with a dismissal with prejudice.

5. SMA contended that John was bound by the class action settlement and thus the case should be transferred. However, the U.S. District Court of Nevada

disagreed and granted John's Motion to Remand, holding that the claim was under the jurisdictional requirement of $75,000, and therefore the Federal Court did not have jurisdiction in a diversity case, and had no jurisdiction to transfer that case. (App 18a - 22a).

6. The United States District Court in Nevada analyzed the *Bussie*, *supra*, case and noted that jurisdiction in the *Bussie* case was acquired because the *Bussie* Plaintiffs had the necessary diversity amount, and also there was a federal question. The Nevada Court also noted that in the case at bar there was no federal question, so John's claim for $10,327.58 was not within the Bussie Court jurisdiction. (App. 18a - 22a).

7. Petitioner submits the U.S. District Court in Nevada decided all jurisdictional issues in Petitioner's case, that the diversity requirement of $75,000.00 was not met, and a federal question did not exist. Petitioner submits said decision is res judicata on the jurisdiction issue. *Alitalia-Linee Aeree Italiane v. Second Judicial District Court of the State of Nevada*, 92 Nev. 638, 556 P.2d 554 (1976).

8. SMA did not challenge the decision of the Nevada District Court to the 9th Circuit Court of Appeals. Petitioner contends by not challenging said decision they concede that it was correct and indeed they must have conceded it was correct.

9. SMA then filed a Motion in the *Bussie v. Allmerica*, *supra*, case for an injunction against Petitioner from proceeding with his Nevada action over John's objection. District Judge Gorton filed his Opinion

dated the 19th day of September, 2006. (App. 7a - 17a). Judge Gorton rejected the binding effects of Nevada Federal Court decision. No where in his Opinion does he discuss the Article III Case or Controversy requirement. Judge Gorton granted the injunction, but he also noted:

> The Court reminds Mr. Foley that its decision does not preclude him from seeking relief pursuant to the terms of the settlement agreement to which he is bound.

10. Petitioner did not believe Judge Gorton's Order was a final order. He believed he had to seek relief under the settlement agreement before the decision would be final. Petitioner did seek relief from SMA, but was denied. Then he filed a Motion entitled "Motion to Allow John P. Foley to Seek Relief Pursuant to the Settlement Agreement as Granted by Judge Gorton in his Memorandum and Order filed September 19th, 2006" before Judge Gorton. Judge Gorton entered an Order Denying said Motion on the 18th day of May, 2007.

11. Petitioner appealed both of Judge Gorton's orders to the First Circuit.

12. Petitioner believes the First Circuit erred on the timeliness of the appeal of the first order in affirming the injunction.

13. Petitioner asserts the First Circuit's analysis of the Article III requirement was wrong. The First Circuit held that Plaintiff was bound by the class action because he purchased his policy during the class period, and he could have anticipated they would raise the rates.

14. Petitioner does not believe that a possibility of rates being raised can serve as a Rule 23 or Article III claim that Petitioner had during the class period. It could not serve as a case or controversy during the class period, and therefore, if Petitioner did not have a claim under FRCP 23 or a case under Article III during the class period, then the Massachusetts District Court had no authority to compel him to opt out of the case. This was not a bankruptcy case or an insurance liquidation case, but a class action. Thus Petitioner did not have to opt out of the class action. The Court did not have jurisdiction to compel him to opt out.

15. The Decision of Judge Gorton on jurisdiction was based upon the supplemental jurisdictional act of 1990, and the *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 125 S. Ct. 2611 (2005) case and *Cotter v. City of Boston*, 323 F.3d 160, 172 (1st Cir. 2003) case. Petitioner submits that Judge Gorton stretched the supplemental jurisdictional statute issue beyond the outer limits. Thus to make a class action binding on persons who had nothing to do with the class action case, unlike the situation in *Exxon*, where the parties included within the class action were allowed to be Plaintiffs without their claims meeting the $75,000; however, those parties in *Exxon* were claimants from the beginning. They were not like Petitioner, who was brought into this class action in 2006, years after the class action was dismissed with prejudice 7 years earlier.

The *Exxon* case was followed by the *Daimler Chrysler v. Cuno*, 126 S. Ct. 1854, 164 L. Ed. 2d 589 (2006) case, and cited therein by this Court, where this Court speaking through Chief Justice Roberts made it

clear on its own motion that the case in controversy requirement of Article III must be considered to establish federal jurisdiction.

Petitioner submits the Massachusetts District Court did not have jurisdiction over Petitioner to compel him to opt out. That the supplemental jurisdiction act did not reach out to include Petitioner. That the decision of the United States District Court, District of Nevada was binding on the issues of federal jurisdiction in Petitioner's case. The Massachusetts case had no jurisdiction over Petitioner. That this case is clearly distinguishable from *Exxon* and *Cotter*.

It must be remembered class actions do not extend the jurisdiction of federal courts. *Snyder v. Harris*, 394 U.S. 332, 89 S. Ct. 1053 (1969).

CONCLUSION

The Federal District Court of Massachusetts relied on the *Exxon* case that relied upon the 1990 Statute of Congress, Title 28, Section 1367, providing for supplemental jurisdiction to extend Federal jurisdiction over Petitioner from a class action in Massachusetts dismissed with prejudice in 1999 to a case filed in Nevada State Court in 2005.

Petitioner did not have Article III case or controversy against any Defendant in the class action, or a claim under FRCP 23 governing class actions. Thus, the Massachusetts Court could not compel the Petitioner to opt out or lose his right to sue.

Petitioner asserts his constitutional rights have been violated by the extension of the definition of case or controversy under Article III to Petitioner's claim and to extend the boundaries of class action jurisdiction beyond the jurisdiction of limit of United States Courts.

Respectfully submitted,

JOHN P. FOLEY
Attorney for Petitioner
601 So. Rancho, Suite A1
Las Vegas, Nevada 89106
(702) 363-2323
(702) 386-5900

APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT ENTERED APRIL 24, 2008

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 07-2160

VICTOR BUSSIE, ET AL.,

Plaintiffs,

JOHN P. FOLEY,

Appellant,

v.

ALLMERICA FINANCIAL CORPORATION, ET AL.,

Defendants, Appellees.

Before

Boudin, *Chief Judge*,
Torruella and Howard, *Circuit Judges*.

JUDGMENT

Entered: April 24, 2008

Appendix A

Plaintiff John P. Foley appeals two orders of the district court, the first enforcing against him the final judgment in *Bussie* v. *Allmerica Financial Corp.*, 50 F.Supp.2d 59 (D. Mass. 1999); the second denying his own motion for relief under the settlement agreement. The appeal of the first (September 2006) order must be *dismissed* as untimely. That order was final because it left the court with nothing more to do. What the plaintiff would do next had no bearing upon its appealability.

The second (May 2007) order must be *affirmed.* As the district court explained, the plaintiff is bound by the same time restrictions as any other class claimant. To the extent that he is collaterally attacking the 1999 judgment even as he seeks relief under the settlement, we are not persuaded that the judgment was void as to the plaintiff for lack of standing.[1] The plaintiff arguably suffered an injury-in-fact simply by purchasing a qualifying policy during the class period and living with the future risk that, in his own words, the defendant would "unjustifiably interpret[] ambiguous policy language in its favor." He was free to opt out of the class or seek relief under the settlement. Unfortunately, he did neither.

The appeal is *dismissed* in part and *affirmed* in part. Each side shall bear its own costs.

By the Court:

/s/ Richard Cushing Donovan, Clerk.

---

1. The January 2006 order of the United States District Court for the District of Nevada has no bearing upon this question.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS FILED MAY 18, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
97-40204-NMG

VICTOR BUSSIE, MORLEY MORGANA, QUENTIN DAWSON and MARGARET DAWSON, individually and as representatives of all others similarly situated,

Plaintiffs,

v.

ALLMERICA FINANCIAL CORPORATION, et al.,

Defendants.

MEMORANDUM & ORDER

GORTON, J.

The underlying case involves a 1997 class action law suit brought on behalf of life insurance policyholders against their insurers alleging that the defendant-insurers had committed fraudulent and deceptive acts to induce them to purchase insurance. The law suit was settled with court approval in 1999. The Court's

Appendix B

Memorandum & Order ("M&O") to certify the settlement class and approve the settlement agreement ("the Agreement") provides additional factual background about the case. *See Bussie* v. *Allmerica Fin. Corp.*, 50 F. Supp. 2d 59 (D. Mass. 1999).

In February, 2005, John Foley ("Foley") filed a complaint in a Nevada state court against SMA Life Assurance Company, Allmerica Financial Life Insurance and Annuity Company and John Hancock Life Insurance Company, hereinafter collectively referred to as "Allmerica". In its answer to Foley's complaint, Allmerica asserted, *inter alia*, that his claims were precluded by the terms of the Final Order and Judgment entered by this Court in 1999. Accordingly, Allmerica moved to enforce the Final Order and Judgment against Foley and to enjoin him from prosecuting his action in Nevada.

In September, 2006, this Court issued a M&O allowing a motion by Allmerica to enforce the Court's Final Order and Judgment and to issue a preliminary injunction against Foley. The Court thereby enjoined Foley from prosecuting the claims that he asserted in his complaint filed in the District Court, Clark County, Nevada and stated further that:

> This Court reminds Mr. Foley that its decision does not preclude him from seeking relief pursuant to the terms of the settlement agreement to which he is bound.

The meaning of that sentence is at the crux of the pending motion.

Appendix B

In October, 2006, Foley informed Allmerica that he wanted to pursue ADR with regard to his claim for overcharges. The terms of the Agreement outlined the mechanics by which relief was to be available and administered to the class members. Specifically, it provided that members of the settlement class who wished to participate in the ADR process must elect that particular relief by submitting an Election Form within a 65-day period. Specifically, all claimants, including Foley were required to submit that form, postmarked by October 18, 1999 in order to participate in the ADR process. Allmerica contends, and the Court agrees, that the terms were clearly outlined for all class members, including Foley. Foley failed to submit an Election Form.

Despite the expiration of that deadline nearly seven years ago, Foley now seeks to pursue ADR. Rebuffed by Allmerica, he filed this pending motion, contending that the noted provision of this Court's September M&O requires that his claim for ADR "be considered timely . . . [because] [i]t is not reasonable to assume that Judge Gorton intended to bar me from seeking relief at this time."

The Court reluctantly disagrees. In issuing that M&O in September, 2006, the Court did not alter or amend the Agreement (or any particular terms thereof). Foley is entitled to the same rights as any claimant under the Agreement. Unfortunately for him, he is also bound by the same restrictions and, in this case, his claim for ADR is untimely.

Appendix B

ORDER

Accordingly, Foley's motion to seek ADR relief at this late juncture (Docket No. 133) is **DENIED**.

So ordered.

/s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: May 18, 2007

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS FILED SEPTEMBER 19, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No.
97-40204-NMG

VICTOR BUSSIE, MORLEY MORGANA, QUENTIN DAWSON and MARGARET DAWSON, individually and as representatives of all others similarly situated,

Plaintiffs,

v.

ALLMERICA FINANCIAL CORPORATION, et al.,

Defendants.

MEMORANDUM & ORDER

GORTON, J.

Currently pending is a motion to enforce a final order and judgment entered by this Court in 1999. The Court will allow the motion.

Appendix C

I. *1997 Class Action*

This matter pertains to a class action lawsuit that was commenced in 1997 and settled with court approval in 1999. As more fully described in this Court's decision to certify the class and approve the proposed settlement, *see Bussie* v. *Allmerica Fin. Corp.*, 50 F. Supp. 2d 59 (D. Mass. 1999), the suit was initially brought on behalf of a class of life insurance policyholders against their insurers. The plaintiffs alleged that the defendant-insurers had committed fraudulent and deceptive acts to induce them to purchase insurance thereby rendering the insurers liable for breach of contract, fraud, breach of fiduciary duty, breach of the covenant of good faith and fair dealing, negligence, unjust enrichment and breaches of various statutes including the federal Truth in Lending Act. The putative plaintiff class comprised all persons with an ownership interest in one or more life insurance policies issued by the defendants during the period January 1, 1978, through May 31, 1998.

A provisional settlement was reached in November, 1998. After a hearing relating thereto, the Court entered an order that, *inter alia*, certified a class on a preliminarly basis under Fed. R. Civ. P. 23(b)(3) for settlement purposes, scheduled a final hearing on the proposed settlement for March, 1999, and directed the forms and methods of notice to class members about the action, the proposed settlement and the availability

of "opting out" of the class.[1] The Court also preliminarily enjoined all class members who did not timely opt out of the class from prosecuting any lawsuit based upon or relating to the claims, facts or circumstances encompassed by the class action.

As directed by court order, approximately 312,000 copies of the Court-approved notice of the class action and proposed settlement were sent by first-class mail to current and former policyholders. In addition, a summary notice was published in *The Wall Street Journal, USA Today* and the newspaper of largest circulation in each of the 50 states and Puerto Rico over two consecutive days in December, 1998. Of the notices sent by first-class mail, less than seven percent of the total were returned as undeliverable. The notice required requests for exclusion from the class to be filed on or before February 17, 1999, and the Court ultimately received only 488 such requests (out of approximately 431,000 policies subject to the proposed settlement).

After consideration of extensive legal memoranda, affidavits, expert testimony and presentations made at the settlement hearing, the Court concluded that it had

---

1. Fed. R. Civ. P. 23(b)(3) pertains to class actions in which common questions of law or issues of fact predominate over individual questions or issues and the class action is deemed to be a superior adjudicative method than individual lawsuits. Notice to Rule 23(b) (3) class members must be "the past notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort". Fed. R. Civ. P. 23 (c) (2) (B).

jurisdiction over the class members and claims, that a class should be certified under Fed. R. Civ. P. 23(b)(3) and that the terms of the proposed settlement were fair, reasonable and adequate.

The settlement was structured to offer class members two alternative forms of relief. The first option permitted them to submit individual claims for cost-free, alternative dispute resolution ("ADR") to be conducted by neutral claims adjudicators who were selected jointly by the parties. The second option provided general relief without the prerequisite of filing a claim or demonstrating fault or damages. That general relief consisted of the opportunity to purchase an enhanced insurance policy or annuity, including the right of transfer to a relative of the class member.

In conjunction with its certification of the class and approval of the proposed settlement, the Court entered a Final Order and Judgment which, *inter alia*,

> 1) declared the terms of the settlement agreement and final order and judgment in the case to have "res judicata and preclusive effect in all pending and future lawsuits or other proceedings encompassed by [a release incorporated into the Final Order and Judgment]";
>
> 2) permanently enjoined all class members who had not timely opted out of the settlement from participating in "any lawsuit in any jurisdiction based on or relating to the claims and causes of

> action, or the facts and circumstances relating thereto" in the settled case and/or the released transactions; and
>
> 3) asserted the Court's personal jurisdiction over class members and subject-matter jurisdiction over the Final Order and Judgment and its retention of jurisdiction "as to all matters relating to administration, consummation, enforcement and interpretation" of the settlement agreement and Final Order and Judgment.

The Final Order and Judgment also contained a release by all class members of any and all claims that were, could have been or could in the future be brought

> on the basis of, connected with, arising out of, or related to, in whole or in part, the Policies [issued during the relevant class period], the Released Transactions [as defined in the release] and servicing relating to the Released Transactions and Policies . . .

The release defined in great detail the substance of the Released Transactions and the particular matters to which the release applied.

II. *2005 Individual Suit*

In February, 2005, John Foley ("Mr. Foley") filed a complaint in a Nevada state court against SMA Life Assurance Company ("SMA"), Allmerica Financial Life

Insurance and Annuity Company ("Allmerica") and John Hancock Life Insurance Company ("John Hancock"). Mr. Foley had bought life insurance policies for himself and his wife, Phyllis ("Mrs. Foley"), from SMA in March, 1985, and purchased additional coverage in 1986. In 1993, Allmerica succeeded to SMA's interest with respect to those policies and in October, 2003, John Hancock apparently assumed the relevant obligations of Allmerica with respect to the subject policies. For the purpose of this memorandum, defendants are referred to collectively as "Allmerica".

According to Mr. Foley's complaint, he understood that the quarterly premiums on his and his wife's policies would never exceed $1,022.93 and $271 respectively. Mr. Foley alleges that beginning in 2003, however (the year that he turned 75 years old), Allmerica unilaterally, in contravention of the terms of his policy and without his consent, increased his premiums without providing additional insurance benefits. Mr. Foley alleges that Allmerica rationalized the increase in premiums by unjustifiably interpreting ambiguous policy language in its favor. He avers that the increase is unconscionable, constitutes a breach of contract and violates a Nevada statute prohibiting "switching". His complaint seeks damages in the amount of $10,327.58 for excess premiums paid and reasonable attorney's fees.

In its answer to Mr. Foley's complaint, Allmerica asserts various affirmative defenses including that Mr. Foley's claims are subject to and precluded by the terms of the Final Order and Judgment entered by this Court

in 1999. Invoking diversity jurisdiction, Allmerica removed Mr. Foley's case to the United States District Court for the District of Nevada but that court allowed a motion of plaintiff to remand the case in January, 2006, because Mr. Foley's complaint clearly sought damages less than the jurisdictional threshold of $75,000.

The following month, Allmerica filed a motion for this Court to enforce the Final Order and Judgment against Mr. Foley and permanently to enjoin the prosecution of his action in Nevada state court. Allmerica contends that Mr. Foley is a class member who is bound by the terms of the class action settlement agreement and release. More specifically, Allmerica asserts that Mr. Foley received notice of the class action and proposed settlement, that he failed to exclude himself from it and that his present complaint falls within the ambit of claims that were released and precluded under the terms of the Final Order and Judgment.

III. *Discussion*

Allmerica contends that the Final Order and Judgment should be specifically enforced against the claims of Mr. Foley on the grounds that 1) he is a member of the class to which that Final Order and Judgment pertains, 2) he received notice as a class member from which he did not opt out and 3) his current claims are foreclosed by the release that was incorporated into the Final Order and Judgment.

Appendix C

Because the policy under which Mr. Foley seeks coverage was purchased in 1985 and 1986, it clearly falls within the time period covered by the class action (1978-1998). Furthermore, an affidavit offered by Allmerica provides evidence that notices of the class action were sent directly to Mr. Foley at his then current address as contained in Allmerica's records. A notice of the proposed settlement, with information on the opt-out rights of class members, was apparently sent to Mr. Foley in December, 1998. In August, 1999, another notice was sent to the same address informing Mr. Foley of the Court's approval of the settlement with a form offering him a choice of the kinds of relief provided by the settlement agreement (ADR or general policy relief). There is no evidence that the notices to Mr. Foley were not delivered, that he chose to exclude himself from the settlement or that he did not live at the address to which the notices were sent.

In opposition to Allmerica, Mr. Foley asserts that the Final Order and Judgment does not apply to his claims because 1) the Court lacks personal and subject matter jurisdiction over him and the pending matter and 2) his claims fall outside the ambit of transactions released in the 1999 settlement agreement. With respect to his first contention, Mr. Foley proposes that his lack of contacts with Massachusetts and the value of damages sought foreclose this Court's exercise of personal or subject matter jurisdiction over his claims. He suggests that, even if he were deemed to be a class member whose claims were encompassed within the settlement agreement approved in 1999, the Court

lacked jurisdiction over him in that action. In addition, Mr. Foley disputes this Court's authority to enjoin his state court action.

The Court finds Mr. Foley's propositions unpersuasive. First, by providing Mr. Foley notice, an opportunity to be heard and an opportunity to exclude himself with respect to the class action, the Court properly exercised personal jurisdiction over him in the original action. *See Bussie*, 50 F. Supp. 2d at 68 (citing *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 812 (1985)). Second, the Court exercised subject matter jurisdiction over Mr. Foley's claims despite the fact that they would not have met the amount-in-controversy requirement had Mr. Foley commenced an independent lawsuit. The United States Supreme Court has recently held that a federal district court may exercise supplemental jurisdiction over the claims of class members which fail to meet the amount-in-controversy requirement so long as one of the named plaintiffs asserts a claim that satisfies the amount-in-controversy requirement and all other jurisdictional prerequisites are met. *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 125 S. Ct. 2611 (2005).

The Court retains jurisdiction over Mr. Foley to the extent necessary to enforce its Final Order and Judgment. *See Bussie*, 50 F. Supp. 2d at 81. *See also Cotter* v. *City of Boston*, 323 F.3d 160, 172 (1st Cir. 2003) ("A federal court may exercise ancillary jurisdiction to enforce its judgments") citing *Peacock* v. *Thomas*, 516 U.S. 349, 354 (1996)). That power of enforcement

includes the authority to enjoin Mr. Foley's Nevada lawsuit. *See* 28 U.S.C. § 2283 (forbidding a federal court from enjoining an action in state court unless, among other circumstances, doing so is necessary "to protect or effectuate its judgments").

Although the Court sympathizes with Mr. Foley's plight given that he did not discover his insurer's alleged misconduct until after the date of the settlement, that fact does not negate the binding effect of the settlement upon Mr. Foley's present claim. The terms of the settlement expressly provide that:

> Plaintiffs and the Class Members acknowledge that they are aware that they may hereafter discover claims presently unknown or unsuspected . . . . Nevertheless, it is the intention of Plaintiffs and the Class Members in executing this Release fully, finally and forever to settle and release all such matters, and all claims relating thereto, which exist, hereafter may exist, or might have existed [with limited exceptions] . . .

Bussie, 50 F. Supp. 2d at 85.

Mr. Foley's current lawsuit is subject to estoppel by this Court's Final Order and Judgment because his policy was purchased during the relevant class period and his present claim does not "arise in its entirety from facts and circumstances arising after" he received notice of the settlement. *Id.* at 84. His allegation that Allmerica

misrepresented the cost of his future premiums falls squarely within the claims released as part of the settlement. *Id.* at 83 (including among the matters released by the settlement agreement claims relating to the amount of premium payments required to sustain a particular level of coverage). The Court reminds Mr. Foley that its decision does not preclude him from seeking relief pursuant to the terms of the settlement agreement to which he is bound.

ORDER

For the foregoing reasons, Allmerica's Motion to Specifically Enforce this Court's Final Order and Judgment and Permanent Injunction Against John P. Foley (Docket No. 123) is **ALLOWED** but its Motion to Strike and to File a Reply Brief (Docket No. 130) is **DENIED** as moot. Based upon the prior judgment and final order of this Court, John Foley is hereby enjoined from prosecuting the claims that he has asserted in the complaint he filed in the District Court, Clark County, Nevada, No. A499557, Dept. No. XIII. Neither party is awarded attorney's fees or expenses incurred in connection with this matter.

So ordered.

s/ Nathaniel M. Gorton
Nathaniel M. Gorton
United States District Judge

Dated: September 19, 2006

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA FILED JANUARY 25, 2006

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

2:05-CV-387-BES-LRL

JOHN P. FOLEY,

Plaintiff,

v.

SMA LIFE ASSURANCE COMPANY, et al.,

Defendants.

ORDER

On April 14, 2005, Defendants filed an amended Motion to Transfer (#8). Plaintiff filed a Response (#11) on May 4, 2005. Defendants filed a Reply (#13) on May 17, 2005.

On April 20, 2005, Plaintiff filed a Motion to Remand (#9). Defendants filed a Response (#12) on May 12, 2005. Plaintiff filed a Reply (#14) on May 17, 2005.

For the foregoing reasons, Plaintiff's Motion to Remand (#9) is granted and Defendants' Motion to Transfer (#8) is denied as moot.

Appendix D

I. Statement of Facts

On March 22, 2005, Defendants removed this case, asserting that this Court had diversity jurisdiction. In the Petition for Removal (#1), Defendants claimed that they believed that the amount in controversy exceeded $75,000. On March 29, 2005, this Court ordered Defendants to file a statement in support of removal jurisdiction. Defendants filed its Statement (#5) on April 5, 2005, claiming that "Plaintiff alleged his damages exceed $75,000.00 in his Complaint." Plaintiff filed an Objection (#6) to Defendants' Statement, claiming that he alleged slightly more than $10,000 in his Complaint. Plaintiff then filed his Motion to Remand (#9), arguing that this Court does not have jurisdiction because the amount in controversy does not exceed $75,000.

II. Discussion

This Court has original jurisdiction over "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a)(1) (2005). Section 1441(a) provides that "any civil action brought in a State court of which the district courts of the United States have original jurisdiction may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending." 28 U.S.C. § 1441(a) (2005). Section 1447(c) requires a district court to remand an action "[i]f at any

time before final judgment it appears that the district court lacks subject matter jurisdiction . . . ." 28 U.S.C. § 1447(c) (2005).

The removal statute is strictly construed against removal jurisdiction and doubts as to the right of removal are resolved in favor of remanding the case to state court. *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992); *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003). Because of the strong presumption against removal jurisdiction, a defendant bears the burden of proving, by a preponderance of the evidence, that the amount in controversy is met. *Gaus*, 980 F.2d at 566; *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 403-04 (9th Cir. 1996).

Defendants argue that removal in this case was proper for two reasons. First, Defendants claim that, in addition to legal damages, Plaintiff is seeking injunctive relief, which, if granted, exceeds the required jurisdictional amount. Second, Defendants claim that the United States District Court for the District of Massachusetts has already asserted jurisdiction in this matter.

A. *Injunctive Relief*

To determine whether the amount in controversy has been met, "the status of a case as disclosed by a plaintiff's complaint is controlling in the case of a removal . . . ." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 291 (1938); *see also Paschinger v. MGM Grand*

Hotel-Las Vegas, Inc., 802 F.2d 362, 363-64 (9th Cir. (1986).[1] Further, "if, upon the face of the complaint, it is obvious that the suit cannot involve the necessary amount, removal will be futile and remand will follow." *St. Paul Mercury*, 303 U.S. at 292. (citing *North American Transp. & Trading Co. v. Morrison*, 178 U.S. 262 (1900)). Thus, the first inquiry is whether it is facially apparent from Plaintiff's Complaint that the required jurisdictional amount is in controversy.

It is facially apparent from the Complaint that Plaintiff is not claiming the necessary amount to meet the jurisdictional requirement. Although the prayer for relief demanded judgment against Defendants for a sum in excess of ten thousand dollars, Plaintiff specified throughout the Complaint that his actual damages were $10,327.58.[2] Nowhere in the Complaint does Plaintiff

---

1. One Ninth Circuit case, *Valdez v. Allstate Ins. Co*, 372 F.3d 1115 (9th Cir. 2004) states that "the amount-in-controversy inquiry in the removal context was not confined to the face of the complaint." *Id.* at 1117. This statement, however, was made in the context of determining what evidence a defendant can use to prove the amount in controversy if the amount is not clear from the face of the complaint. In the case at bar, the amount is clear from the face of the Complaint. *Valdez* is therefore distinguishable.

2. Plaintiff also demanded reasonable attorney fees. Defendants, however, do not allege that these attorney fees would have increased the money damages to an amount above the required amount in controversy. Instead, Defendants stand on their assertion that Plaintiff is also seeking injunctive relief.

demand injunctive relief that would effectively freeze his premium payments. Thus, because Plaintiff claimed only money damages for less than the required jurisdictional amount, this Court does not have jurisdiction in this case. *See e.g., Dix v. ICT Group, Inc.*, 2003 U.S. Dist. LEXIS 21679, at *12 (E.D. Wash. 2003) (finding no diversity jurisdiction because the plaintiffs expressly claimed less than the jurisdictional amount in their complaint).

Nevertheless, Defendants argue that although the Complaint only demands legal relief, Plaintiff is seeking injunctive relief as well. To support this argument, Defendants claim that, in a telephone conversation with Defendants' counsel, Plaintiff admitted that, in addition to seeking $10,327.58 in legal damages, he was also seeking to freeze his premium payments at their original levels.[3] Specifically, Defendants assert that "Plaintiff has admitted that he is seeking to have the effects of any ruling in his favor act as an injunction over future increases in premiums." Response (#12) at 7. This argument, however, is not consistent with settled case

---

3. The Ninth Circuit has allowed this type of evidence to prove that the amount in controversy has been met if the specific amount claimed is not clear from the face of the complaint. *See e.g., Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 377 (9th Cir. 1997) (holding that an attorney's judicial admission may establish the amount in controversy); *Cohn v. Petsmart, Inc.*, 281 F.3d 837, 840 (9th Cir. 2002) (recognizing that a settlement letter is relevant to determining the amount in controversy if it appears to reflect a reasonable estimate of a plaintiff's claim).

law, recognizing that the secondary effects that a trial court decision may have by way of stare decisis or collateral estoppel cannot be considered when determining the amount in controversy. *See e.g., Healy v. Ratta*, 292 U.S. 263, 268 (1934). Defendants' argument therefore fails.

Accordingly, Defendants have failed to show that the required jurisdictional amount is met in this case.

B. *Jurisdiction in the District of Massachusetts*

Defendants also argue that because the United States District Court for the District of Massachusetts has already asserted jurisdiction over a class action against Defendants in which Plaintiff is potentially a member, this Court likewise has jurisdiction over this case. Defendants further argue that Plaintiff's membership in the Allmerica class action effectively bars this action as he failed to opt out of the class settlement. Nevertheless, the fact that the District Court of Massachusetts asserted jurisdiction in the Allmerica class action is not dispositive of the jurisdictional issue in this case.

The District Court of Massachusetts asserted two grounds for jurisdiction over the Allmerica class action. First, the court found that diversity jurisdiction existed because the named plaintiffs and the named defendants were citizens of different states. Further, the court recognized that the plaintiffs, in good faith, alleged that the amount in controversy exceeded $75,000. Second,

the court found that federal question jurisdiction existed because the plaintiffs alleged that the defendants violated the federal Truth in Lending Act. Similar grounds for jurisdiction, however, are lacking in this case.

Unlike the plaintiffs in the Allmerica class action, Plaintiff never alleged that the amount in controversy was met in this case. Instead, Plaintiff's Complaint, in the prayer for relief, demanded judgment against Defendants for a sum in excess of ten thousand dollars. In addition, however, Plaintiff specified throughout the Complaint that his actual damages were $10,327.58. *See e.g., Eagle v. American Tel. & Tel. Co.*, 769 F.2d 541, 545 (9th Cir. 1985) (stating that "[w]e confine our analysis to the claim as presented by [plaintiff's] initial complaint because the amount in controversy is determined from the pleadings as they exist at the time a petition from removal is filed."). Because Plaintiff never alleged that the amount in controversy was met, the first ground for jurisdiction that the court asserted in the Allmerica class action is lacking in this case.

In addition, Plaintiff has not asserted a claim involving a federal question. Unlike the complaint in the Allmerica class action, Plaintiff's Complaint does not allege that Defendants violated the Truth in Lending Act or any other federal statute. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (stating that "federal [question] jurisdiction exists only when [the] question is presented on the face of plaintiff's properly pleaded complaint."). Because Plaintiff has not raised a federal

question, the second ground for jurisdiction that the court asserted in the Allmerica class action is lacking in this case.

Given the strong presumption against removal jurisdiction, Defendants have failed to prove that the jurisdictional requirements have been met in this case. Because the jurisdictional requirements have not been met, this Court does not reach the issue of whether Plaintiff's membership in the Allmerica class action bars him from bringing this action.

III. Conclusion

IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (#9) is granted and Defendants' Motion to Transfer (#7) is denied as moot.

DATED: This 25th day of January, 2006.

s/ Brian Sandoval
BRIAN SANDOVAL
UNITED STATES DISTRICT JUDGE